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GREG GONZALES
COMMISSIONER

MEMORANDUM

To: Non-Profit Residential Mortgage Entities
From: *JB* Greg Gonzales
Re: Non-Profit Mortgage Loan Originators under Title 45,
Chapter 13
Date: April 8, 2010

In June 2009 the Tennessee General Assembly passed the *Tennessee Residential Lending, Brokerage and Servicing Act* ("Mortgage Act"), which took effect on July 31, 2009 (07/31/09). 2009 Tenn. Pub. Acts 6, ch. 499. A primary objective of the Mortgage Act was to carry out the purposes of and to be compliant with the requirements of the federal *Secure and Fair Enforcement for Mortgage Lending Act of 2008* ("SAFE Act"). The SAFE Act provides that the U.S. Department of Housing and Urban Development ("HUD") must determine whether Tennessee's Mortgage Act complies with the minimum requirements of federal law. While states are charged with enacting licensing standards that meet the requirements of the SAFE Act, overall responsibility for interpretation, implementation and compliance with the SAFE Act rests with HUD. If HUD finds that Tennessee's Mortgage Act does not meet the minimum requirements of the SAFE Act, HUD must establish a regulatory regime to license and regulate individuals meeting the definition of a mortgage loan originator.

In accordance with the SAFE Act, the Mortgage Act provides that no individual shall engage in the business of a mortgage loan originator ("MLO") without first obtaining a license issued by the Commissioner. TENN. CODE ANN. § 45-13-301(a) (2010). Pursuant to the Mortgage Act, a "mortgage loan originator" is "an individual who for compensation or gain or in the expectation of compensation or gain: (1) takes a residential mortgage loan application, or (2) offers or negotiates terms of a residential mortgage loan." TENN. CODE ANN. § 105(15).

An individual meeting the definition of an MLO must be licensed pursuant to the Mortgage Act unless HUD approves or consents to an exemption from licensing. TENN. CODE ANN. § 45-13-201(e). To date, HUD has not allowed an exemption for individuals providing residential mortgage loan origination services for non-profit entities. As such, an individual employed by a non-profit would need to be licensed as an MLO, unless it is

determined that the individual does not meet the definition of an MLO because he/she does not work for compensation. The Department has previously determined that an individual does not meet the "compensation" requirement and thus does not meet the definition of an MLO pursuant to the Mortgage Act if:

- The individual is a volunteer (unpaid) for the non-profit, or
- The individual is paid by the non-profit on a salary or hourly basis (and not a commission basis); BUT ONLY in cases where:
 - the non-profit that makes mortgage loans makes them at a zero percent (0%) interest rate and for zero (0) fees; or
 - a non-profit that brokers loans brokers them for zero (0) fees, has no part in determining the interest rate charged by the third party lender, and the interest rate charged by the third party lender is in no way related to the individual's pay.

HUD recently issued a proposed rule and comments on the proposed rule in an attempt to clarify or interpret certain statutory provisions that pertain to the scope of the SAFE Act's licensing requirements. *See* 74 Fed. Reg. 239, 66548 (Dec. 15, 2009). The proposed rule reflects HUD's tentative position concerning the correct interpretation of the SAFE Act;¹ however, provisions in the proposed rule are subject to change when HUD issues its final rule on the SAFE Act. Though HUD's proposed rule is not final, the proposed rule and comments to the proposed rule do not provide HUD's consent for the commissioner to exempt from licensing individuals who originate loans for non-profit mortgage entities. Furthermore, HUD's comments on the proposed rule relating to the "compensation" requirement propose to negate the Department's previous interpretation of the "compensation" requirement. *See Id.* at 66551 ("The terms 'for compensation or gain' are proposed to be broadly defined . . . and would include any circumstances in which an individual receives or expects to receive anything of value in connection with offering or negotiating terms of a residential mortgage loan. These terms would not be limited to payments that are contingent upon closing a loan."). The proposed rule provides that individuals who do not already possess a valid MLO license must be duly licensed no later than July 31, 2010 (07/31/10). *Id.* at 66552.

FOR INDIVIDUALS PROVIDING MORTGAGE LOAN ORIGINATION SERVICES FOR NON-PROFIT ENTITIES:

The Mortgage Act provides that upon approval or consent by HUD, the commissioner may exempt in whole or in part from the requirements of the Mortgage Act individuals or classes of individuals that the commissioner finds inappropriate to include to effectuate the purposes of the Mortgage Act. Thus far and as reflected in HUD's proposed rule, HUD has declined to approve or consent to the exemption of individuals working for bona fide non-profit entities from the Mortgage Act requirements. Additionally, HUD's proposed rule and comments to the proposed rule suggest a definition of an MLO that is broader than the Department's current definition of an MLO under the Mortgage Act. **In light of HUD's proposed rule and comments to the proposed rule, the Department is alerting individuals providing or intending to provide residential mortgage loan origination services for**

non-profit entities to be aware of HUD's proposed rule and be prepared to comply should this rule become final.

FOR NON-PROFIT RESIDENTIAL MORTGAGE ENTITIES: The Mortgage Act provides the commissioner with the authority to exempt in whole or in part from the requirements of the Mortgage Act those entities (not individuals) that the commissioner finds inappropriate to effectuate the purposes of the Mortgage Act so long as any such exemption does not impede the purposes of the SAFE Act. *See* TENN. CODE ANN. § 45-13-201(d). While the Department has generally found it appropriate to exempt in whole from the Mortgage Act's licensing requirements bona fide non-profit mortgage lenders that do not utilize licensed MLOs, the Department has found it appropriate to only exempt *in part* from the Mortgage Act's licensing requirements bona fide non-profit mortgage lenders that utilize licensed mortgage loan originators.² The Department has found that it would be desirable and appropriate to exempt qualifying non-profit entities that utilize licensed MLOs from the mortgage licensing requirements at Section 201(a) of the Mortgage Act, and that such exemption would not be inconsistent with the purposes of the federal SAFE Act, but has found that an exemption to the mortgage loan originator licensing and sponsorship requirements set forth in Section 301 of the Mortgage Act would violate the federal SAFE Act.³ **Accordingly, and in light of HUD's proposed rule and comments on the proposed rule, the Department is alerting non-profit entities that utilize mortgage loan originators who do not fall within the Department's interpretation of a "mortgage loan originator" under the Mortgage Act to be aware of HUD's proposed rule and be prepared to come into compliance should this rule become final.**

For the present time and until HUD issues a final rule regarding the SAFE Act, however, the Department will continue to interpret the term "mortgage loan originator" to exclude those individuals paid on a salary or hourly basis (and not a commission basis) by a non-profit that makes mortgage loans at a zero percent (0%) interest rate and for zero (0) fees. **PLEASE TAKE NOTICE** that, when and if HUD issues a final rule that is contrary to the Department's interpretation and require individuals who perform origination services for non-profit entities to be licensed pursuant to the Mortgage Act, **the Department will have no alternative but to rescind its previous interpretation and to enforce HUD's final rule IMMEDIATELY upon enactment.** Thus, if HUD should make a determination that the Department's interpretation is inconsistent with the federal SAFE Act, the Department reserves the right to withdraw its position in order to be consistent with HUD.

² Generally, if a non-profit mortgage entity that employs licensed MLOs qualifies for an exemption, the non-profit must register as exempt with the Nationwide Mortgage Licensing and Registry System, provide a surety bond and sponsor its licensed MLOs, but will be exempt from other licensing requirements.

³ The SAFE Act compels, *inter alia*, uniform reporting, tracking, and surety bond requirements for state licensed MLOs. *See generally, Secure and Fair Enforcement for Mortgage Lending Act of 2008*, 12 U.S.C. § 5101 *et. seq.*

In sum, while it is the Department's current position that individuals performing residential mortgage loan origination services for non-profit entities (in accordance with the specifications outlined above) do not meet the definition of an MLO under the Mortgage Act, **the Department STRONGLY ENCOURAGES said individuals to be aware of HUD's proposed rule and the potential conflict with HUD's interpretation of an MLO.**

The Department of Financial Institutions appreciates the good work that non-profit residential mortgage entities do in Tennessee, and looks forward to working with such entities in the future. If you have any questions regarding this letter, please feel free to contact Mr. David T. Axford, Chief Administrator with the Compliance Division via telephone at (615) 253-2862, or via email at David.Axford@tn.gov.